

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Denial
of a Permit to the City of
Andover by the Department
of Natural Resources to
Place Road Fill in Dehn's
Pond (2-610W).

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Bruce D. Campbell Administrative Law Judge, in Andover, Minnesota, on February 9 and 10, 1993 and March 8 and 9, 1993.

Appearances: Jennifer K. Park, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department of Natural Resources (Department or DNR); John M. Burke and William G. Hawkins, Burke & Hawkins, Attorneys at Law, Suite 101, 299 Coon Rapids Boulevard, Coon Rapids, Minnesota 55433, appeared on behalf of the City of Andover (City or Petitioner); and Rosella Sonsteby, 4151 - 141st Avenue Northwest, Andover, Minnesota 55303, appeared on her own behalf in opposition to a grant of the permit.

The record of the proceeding closed on April 30, 1993, with the receipt by the Administrative Law Judge of the final post-hearing memorandum.

This Report is a recommendation, not a final decision. The Commissioner of the Department of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Rodney W. Sando, Commissioner, Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155-4001, (612) 296-2549, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the City of Andover has demonstrated the prerequisites for the partial filling of a protected wetland for road construction purposes under Minn. Rule pt. 6115.0190, subp. 3(F) (1991).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Andover is a city in Anoka County, north of Coon Rapids and northeast of the city of Anoka. In recent years, the population of the town of Andover has increased significantly due to an influx of former residents of the Twin Cities area who now commute, generally, south to the Twin Cities metropolitan area and northern suburbs for their employment. In 1980, the population of Andover was 9,387. By the 1990 census, the resident population had increased to 15,216. The population of the city of Andover has continued to increase since the 1990 census. At the time of the hearing, the Andover population was estimated at 18,000. The city has accommodated its population growth by authorizing residential subdivisions, generally, as city sewer and water become available.

2. In the fall of 1991, the city of Andover approved a plat for a residential development of 161 single-family units on an 84-acre site generally located west of County State Aid Highway 9, north of County Road 116, east of County State Aid Highway 7 and south of 147th Avenue Northwest in the city of Andover. The development project is termed Meadows of Round Lake. The request by the city to construct a public road called Eldorado Street Northwest across Dehn's Pond, protected wetland 2-610W, is the result of the platting of Meadows of Round Lake residential development.

3. Since approximately 1969, Bruce Hay owned the undeveloped land in Andover on the lower southwest corner of Round Lake which eventually became the Meadows of Round Lake residential project. On April 17, 1970, Hay applied to the city's predecessor, Grow Township, for a special use permit to develop a large mobile home park on the site. The Grow Township Board denied the permit. Mr. Hay contended that the denial of the permit was arbitrary, discriminatory and unconstitutional. In *Hay v. Township of Grow*, 296 Minn. 1, 206 N.W.2d 19 (1973), the Supreme Court ordered that a special use permit for a mobile home park development be issued to Mr. Hay by Grow Township. Ex. 32. The township of Grow issued the special use permit for the mobile home park development on August 19, 1974. Ex. 23. As a condition of the special use permit, Hay was required to pay for all sanitary water and sewer lines within the development. As a further condition, however, construction of the park could only commence within two years following the "availability of municipal sanitary sewer service" or the permit would be void. As a consequence of a decision by the Minnesota Court of Appeals in March of 1989, sewer service was made available to the Hay property. *Hay v. City of Andover*, C7-88-1213 (1989), Ex. 27. As a result of the prior Supreme Court decision in 1973 and the decision of the Court of Appeals in 1989, the development of a high density mobile home park in the area ultimately platted as Meadows of Round Lake residential development was a virtual certainty. The city had no means at its disposal to prevent substantial residential development on the former Hay property.

4. Between the date of the decision of the Court of Appeals in 1989 and the date of the permit application in 1991, the city negotiated with the developer and the owners of the property to cause the development in the area of the property to be consistent with residential single family use and in keeping with the surrounding area. As a result of such negotiations, the 84-acre site, described generally in Finding 2, supra, was platted to accommodate only 161 single family unit lots. In 1991, the city gave final approval to the plat for Meadows of Round Lake residential development.

Although not formally Included In the approved plat, the city anticipated at the time of plat approval that the main egress from the Meadows of Round Lake residential development would be a southerly route over the wetland connecting to County Road 116 and, ultimately, to highways leading south.

5. To secure a southerly exit from the Meadows of Round Lake residential development, the city proposed to build a public road, termed Eldorado Street Northwest, in a southerly direction across a portion of Dehn's Pond, state protected wetland 2-610W. The revised plans for the construction of Eldorado Street Northwest across a portion of Dehn's Pond require the placement of approximately .94 acres of fill along more than 400 feet of the wetland. The public road proposed would traverse a portion of the wetland, dividing it into more than one physical part. Drawings of the proposed construction, with mitigation measures recommended by the city's environmental consultant, are attached hereto as Exhibits A and B. Maps of the Meadows of Round Lake residential development, showing the proposed crossing of Dehn's Pond and alternative routes of ingress and egress are included in the record as City Exhibit 30, DNR Exhibit 16 and Sonstebj Exhibit 1. A smaller location map is attached hereto as Exhibit C. At the northwest portion of Round Lake residential development, 147th Avenue connects with State Aid Highway No. 7. That State Aid Highway connects directly with improved roadways leading in a southerly direction towards the Twin Cities. At the southeast corner of the development, 143rd Avenue runs in an east/west direction and connects directly with County State Aid Highway No. 9. County State Aid Highway No. 9, like County State Aid Highway No. 7, connects directly to improved roads leading south to the Twin Cities. Vehicles entering or exiting Round Lake Estates and traversing either 143rd Avenue or 147th Avenue would be required to drive through residential areas in other subdivisions before reaching the appropriate county state aid highway. If the south central egress from Meadows of Round Lake Estates crossing the wetland were used, the connection to a state aid highway would be most direct without requiring travel through residential streets not designed for high density collector street traffic.

6. It is anticipated that the Meadows of Round Lake residential

development when fully sold, will generate approximately 1547 daily vehicle trips. Ex. 21, p. 3. Approximately 928-1392 vehicles per day, depending on the percentage of traffic using the east route, would enter or exit the subdivision and travel on 143rd Avenue and Highway 9, if the wetland access to 116 were not built. Between 155 and 619 vehicles per day, depending on the percentage of traffic using the westerly route, would enter or exit the Meadows of Round Lake subdivision on 147th Avenue and State Aid Highway No. 7, If the southerly access road across the wetland were not built. If the southerly Eldorado Street road were authorized, 59% of the vehicles would enter or exit the subdivision on that road, which would connect directly to County Road 116. Ex. 21 , p. 3. If the Eldorado exit is not constructed, between 60-90% of the vehicles entering and exiting the subdivision will travel along State Highway 9 and 143rd Avenue.

7. Dehn's Pond is a protected type 3 and 4 wetland. It is in a partially denigrated condition as a result of the existence of ditching that was used in the past to facilitate seasonal agriculture. The wetland is also subject to a permit allowing the extraction of water for pumping into Coon Creek. Exhibit 30 shows the existing ditching in the wetland. The recent authorization to construct County Road 116 through the wetland has also compromised its integrity.

8 . The wetland is not prime habitat for larger mammals. although some species may use the exterior fringes of the wetland on a seasonal basis. The prime species of animals found in the wetland include rodents, small mammals and diverse species of ducks and waterfowl. Blanding's turtles, a Minnesota protected species, and Bottlenosed snakes have been recorded within the past ten years on several occasions within a short distance of the wetlands. The wetland has suitable habitat for Blanding's turtles.

9. If a road were constructed across a portion of the wetland, the division of the wetland by the road would create an adverse barrier for the wildlife, isolating populations of animals, giving predators easier and more pronounced access to the heart of the wetland, and bringing noise, people and a roadway deep into the wetland, The wetland currently functions as a groundwater recharging area. Some of the water in the wetland may be discharged to the south. The soils in the wetland are sand or silty soils. The construction of the proposed crossing of the wetland, without sufficient mitigation, might affect water quality downstream in the city of Anoka. Ex. 51. The barrier effect created by a road crossing of the wetland may change the character of and types of plants and other vegetation found in the wetland.

10. A qualitative analysis of the wetland based on a matrix of values developed by STS Consultants Limited and its principal, Theodore Frostman, resulted in the wetland being ranked as having only low or only moderate value. Ex. 28; Ex. 37.

11. The Department of Natural Resources has never recognized the qualitative ranking or evaluation of wetlands performed by STS Consultants Limited. Moreover, a qualitative ranking or evaluation of a particular wetland is relevant only to the issue of mitigation. It has no probative value in determining whether practical and feasible alternatives, including a no-build alternative, exist to placing a road through a wetland.

12. As proposed, Eldorado Street is to be divided into three segments: Segment I extends from County Road 116 to a point 1,600 feet north; Section 2 extends from a point 1,600 feet north of County Road 116 to the intersection with the west line of the Meadows project a distance of 2,200 feet; and Segment 3 which is coextensive with the existing 147th Street West to County State Aid Highway 7. Ex. 21. Segment I is the portion of Eldorado that crosses the wetland. As finally proposed by the city, the fill and proposed roadway will cross more than 400 feet of Dehn's Pond. The amount of fill to be placed is .94 acres. This amount of fill was finally proposed in the revised application to avoid the more stringent one-acre rules of the United

States Corps of Engineers and the Minnesota Environmental Quality Board.
The

width of the proposed crossing is 44 feet and the length was given a variety of estimates in the record from between 420 and 470-490 feet.

13. The mitigation measures and the design changes proposed by the city after consultation with its consultant, STS Consultants, Inc. and the DNR staff, are contained in the revised application of April 8, 1992, and DNR Ex. 1, and Ex. 28. The primary design features accommodating wildlife include a number of culverts, both large and small, and the placement of a barrier. To compensate for the loss of .94 acres of state-protected wetlands the city proposes to create the artificial wetlands shown in Figures 3 and 4 in the

Appendix to Ex. 28. The substitute wetlands provided through mitigation would result in the creation of more than two acres of constructed wetlands as compensation for the .94 acres of existing wetland disturbed by the proposed road crossing. Ex. 28, P. 9. The mitigation plan also creates a system of treatment of storm water runoff through water retention, sedimentation and nutrient uptake to increase the quality of water entering the existing wetland. Ex. 28, p. 5.

14. The route proposed by the city, directly south of Meadows of Round Lake development to County Road 116 is the most geographically direct route available and the least expensive. The projected cost of construction of this portion of Segment I of Eldorado Street through the wetland is \$147,800. Ex. 46, p. 2.

15. The City Council, in the early winter of 1991, determined that a southerly ingress and egress from the Meadows of Round Lake residential development across a portion of Dehn's Pond to County Road 116 was the preferable route. They concluded that the primary alternatives, using 147th Avenue to State Aid Highway 7 and 143rd Avenue to State Aid Highway 9 involved significant safety concerns. They believed that both the intersections of County State Aid Highway 7 and 147th Avenue and 143rd Avenue and County State Aid Highway 9 were currently unsafe at existing traffic levels, without the increased significant traffic to be expected from the residential development. They concluded that these unsafe conditions would not be addressed by the county or state through funding until sometime after the year 2000. The Council was also concerned that using residential streets through other subdivisions which were not designed as collector routes would subject the residents of those subdivisions to unanticipated increased volumes of traffic which would affect the use and enjoyment of their property and, potentially, their safety.

16. The City had reports prepared by two consultants: TKDA, the city's engineering consultants, and STS Consultants Limited, the city's environmental consultant. After determining that a road crossing of Dehn's Pond was the preferable route, the City Council directed TKDA to prepare a feasibility report, discussing the southerly route. At the time TKDA prepared the feasibility report contained in Ex. 21, it had a clear direction from the City Council to support the southerly route. The City Council, not its consulting engineers, made the policy choice that the southerly route over Dehn's Pond was the most appropriate. In its feasibility report, the consulting engineers considered two alternatives: upgrading 143rd Avenue; and upgrading 147th

Avenue. Their report, City Ex. 21, includes cost estimates of the alternatives. At a later date, the city's consulting engineers, TKDA, also performed cost estimates for various types of bridging alternatives. Ex. 46.

17. At the time that the city's environmental consultant prepared the wetland evaluation and mitigation report reflected in Exhibit 28, the city had long since determined that the southerly route crossing Dehn's Pond was the preferable route and STS Consultants Limited was aware of that policy choice by the City Council.

18. On November 22, 1991, the DNR received the original application from the city to fill a portion of Dehn's Pond.

19. On January 29, 1992, the Department of Natural Resources was notified by an attorney, Linda Fisher, that she would be representing both the developer and the city in its permit application process. DNR Ex. 48. On January 30, 1992, the city asked the DNR to suspend further review of the permit application until the city could respond to the Department's concerns.

20. On April 8, 1992, attorney Linda Fisher submitted, on behalf of the city, a supplemental permit application, consisting of her letter with seven attachments. DNR Ex. 1.

21. Between April and August of 1992, a number of DNR officials reviewed the submissions by the city and recommended denial of the permit to their superiors on the grounds that the public need for the construction had not been demonstrated and that feasible alternatives to crossing the wetland existed. See, DNR Ex. 47; DNR Ex. 6; DNR Ex. 2; DNR Ex. 7; DNR Ex. 3; DNR Ex. 4; DNR Ex. 8.

22. (A September 25, 1992, the Department issued its formal denial of the revised permit application. DNR Ex. 9. The reasons given for the denial were twofold: the alternatives having less environmental impact had not been fully explored by the city; and the project, even as revised with mitigation, would cause significant damage to the wetland ecology. DNR Ex. 9.

23. As an alternative to construction of Eldorado Street Northwest through Dehn's Pond, a clear span bridge, which would not require a DNR permit, is technically feasible. The approximate cost of such a structure would be \$2,300,000. Ex. 46.

24. While a clear span bridge of a sufficient length to cross the portion of Dehn's Pond in question would have significantly less environmental impact than the fill proposal, the DNR stipulated at the hearing that the cost of such a project would prevent it from being considered a feasible and practical alternative to the proposed extension of Eldorado Street Northwest through the wetland.

25. At pier bridge 32 feet wide and of sufficient length to cross the portion of Dehn's Pond in question would cost approximately \$720,000. Ex. 46. The use of a pier bridge would have significantly less environmental impact on the wetland than would the proposed road crossing using solid fill. The construction of a pier bridge in the wetland is technically feasible.

26. As a consequence of Finding 25, supra, the construction of a pier bridge, as an alternative to a surface road through the wetland is a technically feasible alternative to the proposed construction which is both practical and feasible.

27. A second potential alternative to the proposed land crossing of Dehn's Pond having less environmental impact on the wetland involves the upgrading of existing 143rd Avenue and 147th Avenue and their intersections with County State Aid Highway 9 and County State Aid Highway 7.

28. 143rd Avenue and 147th Avenue have both been designated by the city as state aid streets.

29. 143rd Avenue, as currently constructed, is a low density collector street with a surface of 32 feet back to back or approximately 30.5 feet face to face, with unrestricted parking on both sides of the street. The current weight capacity of 143rd Avenue is seven tons, two tons less than state aid standards. 143rd Avenue is also narrower than is required for a state aid street with parking on one or both sides of the street.

30. 143rd Avenue, as originally designed, was not meant to function as a main collector artery. Portions of the street go through residential neighborhoods. Some homes have driveways that exit directly into the street.

143rd Avenue connects with State Aid Highway 9 to the southeast. That intersection is among the busiest corners in the city. As currently constructed, the intersection of 143rd Avenue and County Road 9 is unsafe. There is an "S" curve on County Road 9 Just before it intersects with 143rd Avenue. There is also an elevation change and a change in the speed zones. The intersection is not served by a traffic signal. Safety at the intersection is also affected by the fact that 143rd Avenue does not enter County State Aid Highway 9 on a true perpendicular line.

31. To upgrade 143rd Avenue and change the intersection of 143rd Avenue and County Road 9 would involve essentially four steps: widening 143rd Avenue to permit parking on one or both sides; increasing the weight design of 143rd Avenue to meet state aid street standards; improving the intersection at 143rd Avenue and County State Aid Highway 9 for cars on 143rd Avenue turning right onto County State Aid Highway 9; and improving the same intersection for cars on County State Aid Highway 9 turning left onto 143rd Avenue.

32. Accomplishing the improvements and changes to 143rd Avenue and the intersection of 143rd Avenue and County State Aid Highway 9 is technically feasible. The parties, however, differ in their cost estimates of accomplishing the changes. The maximum amount estimated in the record for upgrading 143rd Avenue and improving the intersection of 143rd Avenue and County State Aid Highway 9 is \$432,000. City Ex. 21. Included in that amount, however, is \$112,000 for condemnation and relocation of a residence.

33. No party actually conducted a survey of the location of the residence with respect to the location of a dedicated right-turn lane, if one were installed on 143rd Avenue. That installation of a dedicated right-turn lane on 143rd Avenue will require a total condemnation and relocation of a residence has not been established by a preponderance of the evidence.

34. The estimate of the city engineer also includes \$50,000 for improving CSAH 9 by installing a dedicated left turn lane. That amount, however, cannot be considered as an alternative to the construction of Eldorado Street Northwest because the intersection of County State Aid Highway 9 and 143rd

Avenue is currently unsafe, even though only 25% of the Meadows of Round Lake residential development has been constructed. The improvement should be made for safety reasons irrespective of whether Eldorado Street Northwest is constructed through Dehn's Pond.

35. The estimate of the city engineer also includes \$80,000 for the installation of a traffic signal at the intersection of 143rd Avenue and County State Aid Highway 9. The projected traffic levels for the Meadows of Round Lake residential development do not, however, approach the density required for the installation of a traffic light. If safety concerns warrant

the installation of a traffic light with the levels of traffic projected.
then. like the dedicated left-turn lane on County State Aid Highway 9, that improvement should be made for safety reasons regardless of whether the permit is granted.

36. The true cost of upgrading 143rd Avenue and improving the intersection of County State Aid Highway 9 and 143rd Avenue, as an alternative to the construction of Eldorado Street through Dehn's Pond, is between \$100,000-\$190,000. Not included in this costs are safety improvements that should be made, even if the permit were granted. The cost of construction for the wetland crossing is \$147,800. Ex. 21.

37. Even if 143rd Avenue were upgraded and its intersection with County State Aid Highway 9 improved, the increased traffic moving on 143rd Avenue through residential areas will have an effect on those residents living immediately adjacent to the street, since the amount of traffic on the street would increase significantly.

38. The increase in traffic on 143rd Avenue, if the improvements to 143rd Avenue and the intersection of 143rd Avenue and State Aid Highway 9 were made, would not have a significant effect on the safety of residents living along the street. The effect on the residents living immediately adjacent to 143rd Avenue is the same effect that occurs naturally as a product of urban development and is experienced routinely by residents of other neighborhoods and other cities within the state when traffic increases.

39. 147th Avenue and County State Aid Highway 7 is an alternative northwest entrance and egress from the Meadows of Round Lake residential development. 147th Avenue and County State Aid Highway 7 currently has a crossing with a stop sign. There is no cloverleaf or improved exit from 147th Avenue to County State Aid Highway 7. The intersection is little used. It is considered by the county and the city to be unsafe even with the current levels of traffic in the area. The existing sight lines at the intersection of 147th Avenue and County State Aid Highway 7 are extremely poor. The intersection should be improved for safety reasons whether or not the permit in this case is approved. If 147th Avenue and 143rd Avenue were used as exits from the Meadows of Round Lake residential development, rather than the proposed Eldorado Street, 75% to 90% of the traffic generated would use 143rd Avenue, rather than 147th Avenue.

40. The highest estimate in the record for the cost of upgrading 147th Avenue is \$238,000. Ex. 46. That estimate contemplates a replacement of the current 32-foot width, seven-ton capacity street with a 40-foot wide street with a nine-ton capacity along that portion from the plat of Meadows of Round Lake to the intersection of County State Aid Highway 7.

41. \$18,000 of the estimate, however, is for needed safety improvements to County State Aid Highway 7 and \$80,000 is an estimated automated signal cost at the intersection of County State Aid Highway 7 and 147th Avenue. Ex. 21.

42. The traffic projections for the Meadows of Round Lake residential development do not meet state standards for the construction of a automated signal at the intersection of County Road 7 and 147th Avenue. If a signal is

needed for safety reasons, it should be installed Irrespective of whether the Eldorado Street Crossing is constructed.

43. A more realistic estimate of the true cost of reconstructing 147th Avenue Northwest and improving the intersection of 147th Avenue Northwest and County Road 7 as an alternative to the Eldorado Street wetland crossing is substantially less than \$238,000 finally projected by the city engineers in City Ex. 46. see, Ex. 21.

44. Residents along 143rd Avenue and 147th Avenue predictably prefer the Dehn's crossing to avoid a significant increase in the traffic going through their residential neighborhoods.

45. Upgrading 143rd Avenue and 147th Avenue and their intersections with County State Aid Highway 7 and County State Aid Highway 9 is technically feasible.

46. The true cost of accomplishing both sets of improvements, as an alternative to the construction of Eldorado Street Northwest through Dehn's Pond, apart from safety improvements which would be required in any event, is not substantially higher than the cost of the road crossing through Dehn's Pond.

47. Upgrading the streets and intersections stated In Finding 45 would present a feasible and practical alternative to the wetland crossing, even if the highest cost estimates of such construction contained in the record were accepted.

Based on the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. All relevant substantive and procedural requirements of law or rule have been fulfilled. The Department and the Administrative Law Judge have jurisdiction in this proceeding pursuant to Minn. Stat. sec. 105.42, 105.44, 105.45 and 14.50 (1992).

2. The applicant has the burden to establish that a denial of the permit would prevent or restrict the project or create a major conflict with a substantial public interest, that there is no other feasible and practical alternative to the project having less environmental impact and that the public need for the project rules out the no-build alternative.

3. In determining whether there are feasible and practical alternatives to the project, economic considerations alone do not Justify a grant of the permit. Minn. Stat. 116D.04, subd. 6 (1992).

4. The proposed project does constitute the construction of a roadway and the facilitation of land transportation across waters within the meaning of Minn. Rule pt. 6115.0190, subp. 3(F) (1991).

5. In determining whether the standard for the grant of a permit contained in Minn. Rule 6115.0190, subp. 3(F) (1991), has been satisfied, it

Is inappropriate to make a qualitative evaluation of the "worth" of the wetland involved.

6. In determining whether the requisite showing of need and the lack of feasible, practical alternatives has been made under Minn. Rule pt. 6115.0190, subp. 3(F) (1991), the offer to provide mitigation, including additional artificially constructed wetlands, is irrelevant.

7. There are "feasible and practical alternatives to the project that would have less environmental impact" within the meaning of Minn. Stat 116D.04, subd. 6 (1992) and Minn. Rule pt. 6115.0190, subp. 3(F) (1991), including an upgrading of the alternative routes along 143rd Avenue and 147th Avenue and the construction of a pier bridge through the wetland.

8. If alternative routes 143 and 147th Avenue are used, there is no public need for the project that rules out the no-build alternative, within the meaning of Minn. Rule pt. 6115.0190, subp. 3(F) (1991).

9. Any conclusion more properly deemed a Finding of Fact, and any Finding of Fact more properly deemed a conclusion is hereby expressly adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends to the Commissioner of Natural Resources that he deny the permit application of the City of Andover to construct Eldorado Street Northwest through Dehn's Pond, Protected Wetland 2-610W, in the City of Andover, Anoka County, Minnesota.

Dated this 25th day of May, 1993.

BRUCE D. CAMPBELL Administrative
Law Judge

NOTICE

Pursuant to Minn Stat. 14.62 , subd. 1 , the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Audio-Magnetic Recording; No Transcript Prepared.

MEMORANDUM

Minn. Stat. 116D.04, subd. 6 (1992), provides that no permit for natural resource management and development shall be granted where such permit is likely to cause pollution, impairment or destruction of natural resources so long as there is a prudent and feasible alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. Economic considerations alone do not justify such conduct. Minn. Rules pt. 6115.0190, subp. 3(F) (1991), provides that placement of fill shall not be permitted for the construction of a roadway or to facilitate land transportation across waters, with the exception that where a project is proposed by a local government agency and a prohibition of construction would prevent or restrict the project, or create a major conflict with other public purposes or interests, the Commissioner may waive the rule if it can be established that: (1) there is no feasible and practical alternative to the project that would have less environmental impact; and (2) that the public need for the project rules out the no-build alternative.

The Administrative Law Judge has concluded that there is a substantial public need for appropriate exits from the Meadows of Round Lake residential development, but that several feasible and practical alternatives to the proposed wetland crossing exist that would have less environmental impact. The Administrative Law Judge believes that either a tier bridge over a portion of the wetland or the improvement of 143rd and 147th Avenues and their intersections with County State Aid Highways 7 and 9 are two such feasible and practical alternatives.

In applying the rule and the relevant statutes to the proposed wetland crossing, it is important to state at the outset the appropriate legal analysis. Under the rule previously cited and the applicable statutes, the placement of fill in a wetland is prohibited, except for the construction of a roadway or the facilitation of land transportation across waters when the project is proposed by a local governmental agency and there is a substantial public need for the project and no feasible and practical alternatives to the project having less environmental impact exist. The burden of establishing all of those factors is upon the applicant for the permit.

While not expressly so stating, the city cites Minn. Stat. 105.45

(1992), to attempt to make the test one of reasonableness only. Here, it is argued, the city was required by judicial decisions to permit development of the area in question. Its approved plat for a 161 lot residential development would have less adverse impact on the environment than would a high density mobile home park, the alternative development plan. The city through its expert consultants, STS Consultants, Ltd., also views the wetland as having only marginal value to the area. The city weighed the marginal value of the wetland against what it considered to be concerns of public safety for residents along 143rd and 147th Avenues to determine that no practical or feasible alternative existed to the road construction through Dehn's Pond. The city, however, reached that conclusion before they had any substantiation of the feasibility or cost of employing alternative routes or the impact their proposed construction would have on the environment. The decision by the City Council to favor the southern route was made before its expert consultants did their studies. The studies were prepared by the consultants sometime after

the policy decisions had been made by the city. The city also selected the lowest cost alternative having the least public opposition.

The Administrative Law Judge finds that the city's analysis is flawed for a variety of reasons. As stated In Conclusion 2, supra, the city must show more than the reasonableness of its proposal. It must make the full showing required by Minn. Rule pt. 6115.0190, subp. 3(F) (1991). That showing includes the absence of feasible and practical alternatives to the project having less environmental impact. In determining whether such alternatives exist, considerations of cost have an extremely limited role to play, as will be hereinafter discussed.

The city employed STS Consultants, Ltd. to evaluate the wetland and prepare a mitigation report. The consultants applied a 'matrix' analysis in which they assigned, on some basis, values to particular characteristics of the wetlands. After applying their matrix, they determined that the wetland was of extremely limited value from an environmental standpoint. This analysis was coupled with design changes and an offer to construct artificial wetland on a more than two-to-one basis. Again, while not so stated directly, the city implies that its offer to replace the wetland taken by more than double the amount in artificial wetland, when weighed with the "minimal value" of the wetland and publicly expressed safety concerns, justifies the proposed construction.

The Administrative Law Judge rejects the analysis of STS Consultants, Ltd., applying a qualitative analysis to an individual wetland, as having any value in determining whether the showing required by Minn. Rule pt. 6115.0190, subp. 3(F) (1991), has been made. The Administrative Law Judge is not free to assess the value of particular wetlands and to substitute his judgment about reasonableness for that contained in the rule, which has the force and effect of law. While the value judgment made by the city may not be "unreasonable", when viewed from its perspective and constituency, the Legislature and the Department, through the rulemaking process, have formulated a different test and weighed the factors differently. The Administrative Law Judge is not free in this contested case proceeding to change governing legal requirements. It is important to note that when directly questioned by the Administrative Law Judge, the principal of STS Consultants, Ltd. agreed that the "value" of the wetland under his matrix system was not a factor in determining whether the requisite showing under Minn. Rules pt. 6115.0190, subp. 3(F) (1991), had been made. In his view, the correct consideration to be given to a "value" analysis of a wetland was in formulating an appropriate mitigation program.

The Administrative Law Judge is also cognizant of the fact that the city has proposed replacement of the wetland filled on a basis of more than two acres to one. Again, however, offers at mitigation are irrelevant in determining whether the showing under Minn. Rule pt. 6115.0190, subp. 3(F)

(1991). has been made. The law does not allow a member of the public to degradate existing wetlands just because he or she offers a replacement. The statutes and rule do not recognized replacement or mitigation as an alternative to making the requisite showing of necessity before a road is place through a wetland. Further, Executive Order 91-3, implementing the Wetland Conservation Act of 1991, Minn. Laws 1991, c. 354, demonstrates that mitigation through replacement is the final alternative, to be used only after all other efforts at maintaining an existing wetland have been exhausted.

As previously stated, the Administrative Law Judge has determined that feasible and practical alternatives to the construction of the roadway through Dehn's Pond exist. The city concluded that no feasible practical alternative to the project existed because (1) the costs associated with the alternatives were excessive as compared to the cost of crossing the wetland and (2) improving 143rd and 147th Avenues to become high density collectors would subject some residents along the avenues to increased traffic -- an asserted safety hazard. There appears to be no dispute that 143rd and 147th Avenues and their associated County State Aid Highway intersections are technically capable of improvement to accommodate the increased traffic safety.

Words in a statute or rule are to be construed in accordance with their meaning in common English usage. Minn. Stat. 645.08 (1992). Webster's Third New International Dictionary (Unabridged) (Merriam-Webster, 1971), p. 831, defines the word "feasible" to mean "capable of being done, executed or effected: possible of realization". The same source, at page 1780, defines the word "practical" to mean "available, usable or valuable in practice or action: capable of being turned to use or account: useful; given or disposed to action as opposed to speculation or abstraction". As previously noted, using 143rd and 147th Avenues as alternate routes to the proposed construction through the wetland is technically possible or "feasible". The real question remaining is whether the cost of such construction and the Impact on residents along the avenues make it "impractical". As noted in the Findings, there is a dispute in the record as to the true cost of making the alternative improvements. For purposes of this analysis, the Administrative Law Judge will assume that such costs make the improvement of the alternative routes at least twice as expensive as the wetland crossing.

Minn. Stat. 116D.04, subd. 6 (1992), prohibits sole reliance on cost or economic factors as a justification for denegrating the environment. Significant differences in cost alone do not justify placing a public road in a wetland rather than using alternative land routes. Application of the city of White Bear Lake, 247 N.W.2d 901, 906 (Minn. 1976); Urban Council on Mobility v. Minnesota DNR 289 N.W.2d 729 (Minn. 1980). See State by Archabal v. County of Hennepin 495 N.W.2d 416, 426 (Minn. 1993). Minn. Rule pt. 6115.0190, subp. 3 (F) (1991), is properly interpreted identically to Minn. Stat. 116B.04 (1991) as regards the existence of a feasible, practical alternative. In a series of cases interpreting that statute, the Minnesota Supreme Court has held that protection of natural resources is to be given paramount importance and destruction or impairment will only be allowed when

there are truly unusual factors present in the case or the cost of community disruption from the alternatives reaches an extraordinary magnitude. Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979); PEER v. Minnesota Environmental Quality Council 266 N.W.2d 858 (Minn. 1978); County of Freeborn v. Bryson, 243 N.W.2d 316 (Minn. 1976); State by Archabal v. County of Hennepin, supra. The primary alternatives, having the least impact on the environment, are the upgrading and improvement of 147th Avenue and County State Aid Highway 7 and 143rd Avenue and County State Aid Highway 9, as reflected in Findings 31-47, supra. There is no dispute that the improvements are technically feasible and that there is some associated cost. The cost of constructing the road through the wetland has been estimated at \$147,800. The likely cost of the improvements to be made to 143rd Avenue and 147th Avenue and to the intersections of those roads and their adjoining County State Aid Highways are stated in Findings 36, 41 and 43, supra.

The Administrative Law Judge believes that the estimates made by TKDA are a "worst case" scenario and include improvements that should be made for safety reasons, even if the proposed construction in Dehn's Pond were authorized. All of the testimony at the hearing was that the intersections of County State Aid Highway 7 and 147th Avenue and 143rd Avenue and County State Aid Highway 9 are unsafe with existing traffic levels. That unsafe condition will become more pressing if the intersections receive additional traffic from the Meadows of Round Lake Addition. The answer to that lack of safety is not, however, further degradating a wetland, the line of least public resistance and cheapest cost.

The Administrative Law Judge also concludes that the likely true costs of making the changes to the stated streets and county state aid highways as an alternative to the Dehn's Pond crossing proved a practical alternative from a cost standpoint, whether or not project costs are deemed to include safety changes which should be made irrespective of the decision in this case under the city engineer's 'worst case' scenario.

Apart from considerations of cost, the city also raises concerns about the public safety from using 147th and 143rd Avenues as alternative routes. Safety for vehicles using the alternative routes can be achieved from the improvements and design changes discussed in the Findings. Achieving these results is really, primarily, a question of cost. The city also raises a safety concern for persons living along the alternative routes who would experience significantly increased traffic volumes. This is not, however, an unusual or overwhelming problem. Collector streets routed through residential neighborhoods are extremely common in Minnesota cities and developed areas. It is a natural consequence of the type of growth Andover has experienced.

The Administrative Law Judge also has concluded that the construction of a pier bridge in the wetland, at a cost of \$720,000, is also a practical and technically feasible alternative to placing a surface road on fill in Dehn's Pond. The city argues that they were told by the Department at some point in the discussion process that a bridge was not a practical alternative. Irrespective of whether that conversation took place or what the

understandings were, the city has requested a hearing on its permit denial. During that hearing, it has the burden of establishing that there are no practical, feasible alternatives to the proposed construction. The inquiry is on the present, not on past statements by the licensing authority, unless some type of estoppel is asserted. The inquiry is not who was right or wrong at a time in the past but what the city can demonstrate during the contested case hearing.

The Administrative Law Judge has concluded that the cost associated with the construction of the technically feasible pier bridge in the wetland makes that alternative a practical, feasible alternative to the proposed construction. A pier bridge is not, however, favored over the improvement of 143rd and 147th Avenues and their associated county state aid highway intersections. A pier bridge would have some impact on the environment by bringing a number of vehicles through the heart of the wetland, an impact which would not occur if existing alternative streets were improved.

The Administrative Law Judge, therefore, finally concludes that the city has proposed a project which to it seems reasonable, reflecting the

appropriate balancing of environmental needs with the expressed wishes of its citizens. The law, however, In the absence of a demonstrated substantial threat to public safety, has struck a different balance in favor of wetland preservation.

B.D.C.